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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION

KELSEY CASCADIA ROSE JULIANA, et al., Plaintiffs,	Case No. 6:15-cv-01517-TC
v.	
UNITED STATES OF AMERICA, et al., Federal Defendants.	**Expedited Hearing Requested**

MEMORANDUM IN SUPPORT OF FEDERAL DEFENDANTS' MOTION TO CERTIFY ORDER FOR INTERLOCUTORY APPEAL

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INTRODUCTION

Interlocutory appeal of a district court order is appropriate when the order involves a controlling question of law as to which there is a substantial ground for a difference of opinion and an immediate appeal may materially advance the ultimate termination of the litigation. The Court's determinations that Plaintiffs have Article III standing to sue the Federal Defendants for alleged harms due to climate change, that they have stated a violation of a fundamental constitutional right under the Due Process Clause, and that they have stated a viable claim under the public trust doctrine are textbook examples of controversial and controlling legal determinations for which a contrary ruling will advance the ultimate termination of this litigation. Thus, certification of the Court's November 10, 2016 order denying the motions to dismiss is warranted. Further, expedited consideration is warranted in this case given the significance of the issues raised and the burden on Federal Defendants that discovery is likely to impose.

BACKGROUND

Without any basis in federal statutes passed by Congress, Plaintiffs seek to employ creative and unprecedented legal theories to obtain a sweeping court order directed at virtually all aspects of U.S. Executive Branch decision-making concerning carbon dioxide (CO_2) emissions from the development, transportation and consumption of fossil fuels. They assert claims primarily under the Due Process Clause of the Fifth Amendment and a federal version of the "public trust doctrine," neither of which has, prior to this case, ever been interpreted to support a legal right relating to climate change. Much less, neither has been interpreted to furnish a private right of action for sweeping equitable relief unmoored from any statutory cause of action for relief concerning specifically-identified agency actions. For relief, they ask the

Court to enjoin the Executive Branch to "prepare a consumption-based inventory of U.S. CO_2 emissions," and to "prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO_2 . . . ." First Am. Compl. for Decl. and Inj. Relief 94, ECF No. 7 ("Compl."). They also ask the Court to retain jurisdiction for an indefinite period of time to monitor and ensure that the President, his Executive Offices, and the various named Defendant agencies will comply with the "national remedial plan," *id.*, thus injecting the Court into the day-to-day management of the Federal Defendant entities.

Federal Defendants moved to dismiss the complaint for lack of Article III standing and for failure to state a claim under the Fifth Amendment Due Process Clause, the Fifth Amendment equal protection principle, the Ninth Amendment, and the public trust doctrine. Fed. Defs.' Mot. to Dismiss, ECF No. 27. The National Association of Manufacturers, the American Fuel & Petrochemical Manufacturers, and the American Petroleum Institute intervened in the case and moved to dismiss on these grounds and on the ground that the case presents non-justiciable political questions. Mem. in Supp. of Intervenor-Defs.' Mot. to Dismiss, ECF No. 20.

On April 8, 2016, the magistrate assigned to the case issued findings and a recommendation that the Court deny the motions to dismiss. The magistrate recommended that Plaintiffs be permitted to go forward on their due process and public trust claims despite recognizing that the claims "appear[] to implicate authority of the Congress" and that the request for relief "implicate[s] some unmanageable issues." Order and Findings & Recommendation at 13, 14, ECF No. 68. On the due process claim, the magistrate applied a "shocks the conscience" standard ordinarily reserved for cases where a plaintiff sues state actors (usually law enforcement officers) for money damages pursuant to 42 U.S.C. § 1983 for highly individualized and acute physical injury. *Id.* at 15-17. On the public trust claim, the magistrate found that a federal version of the doctrine exists and that it provides substantive due process protections for some Plaintiffs within the navigable waters of Oregon. *Id.* at 17-24. The magistrate recommended that the Court find that Plaintiffs have standing to bring these two claims. *Id.* at 4-12.

Federal Defendants and Intervenor Defendants objected to the magistrate's findings and recommendation but, on November 10, 2016, the Court issued an opinion and order denying the motions to dismiss and permitting Plaintiffs to proceed with their claims under the Due Process Clause of the Fifth Amendment and the public trust doctrine. On the issue of standing, the Court found that Plaintiffs successfully alleged injury, causation, and redressability. Opinion & Order, ECF No. 83 ("Op."). The Court acknowledged that the Ninth Circuit in *Washington Environmental Council v. Bellon*, 732 F.3d 1131, 1141 (9th Cir. 2013), had denied standing to a citizens group seeking to require the State of Washington to regulate greenhouse gas emissions from particular refineries in that State, because the causal link between the State's regulatory inaction and the plaintiffs' climate-change-related injuries was "too attenuated." Op. at 22. But it found that *Bellon* was distinguishable on grounds that it involved an appeal from a grant of summary judgment, rather than a motion to dismiss, and that it involved a less significant share of global CO_2 emissions than the present case. *Id.* at 23-24. On the redressability inquiry, the Court similarly emphasized the magnitude of the global emissions that Plaintiffs claimed were attributable to the Federal Defendants (estimated by Plaintiffs to be a quarter of the planet's greenhouse gas emissions) and concluded that the requested relief would redress their alleged injuries. *Id.* at 27.

Regarding Federal Defendants' contention that Plaintiffs had failed to state a cognizable cause of action under the Due Process Clause, the Court conceded that the challenged government actions would survive rational basis review. *Id.* at 30. However, the Court determined that the Due Process Clause protects a fundamental right to a "climate system capable of sustaining human life," *id.* at 32, thus suggesting that the challenged government actions are subject to strict scrutiny. The Court held that "where a complaint alleges governmental action is affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet's ecosystem, it states a claim for a due process violation." *Id.* at 33. The Court found that the Ninth Circuit had recognized an affirmative duty on the part of government agencies to act to protect fundamental rights when persons have been placed in peril by acts of government taken with deliberate indifference to safety. *Id.* at 33-36.

With respect to the public trust claim, the Court concluded it was unnecessary at this stage to resolve whether that doctrine, which arose at common law to protect the public interest in waters, also protects the atmosphere, because Plaintiffs also alleged violations of the doctrine in connection with the territorial sea of the United States. *Id.* at 40-42 & n.10. The Court rejected Federal Defendants' reliance on the Supreme Court's decision in *PPL Montana, LLC v. Montana*, 565 U.S. 576 (2012), and the Ninth Circuit's decision in *United States v. 32.42 Acres of Land,* 683 F.3d 1030 (9th Cir. 2012), for the proposition that the public trust doctrine, whatever its scope, applies only to the states and not to the federal government. The Court concluded that it "can think of no reason why the public trust doctrine, which came to this country through the Roman and English roots of our civil law system, would apply to the states but not to the federal government." Op. at 47. The Court disagreed with our contention that common law public trust claims would in any case be displaced by statute, specifically the Clean Air Act. The Court distinguished *American Electric Power v. Connecticut*, (*AEP*), 564 U.S. 410

(2011), on the ground that it did not involve public trust claims, which "concern inherent attributes of sovereignty," and concluded that "displacement analysis simply does not apply." Op. at 49. Finally, the Court rejected Federal Defendants' argument that Plaintiffs lack a private right of action to enforce a public trust claim, reasoning that a right of action to enforce the public trust doctrine arises from the Fifth Amendment substantive Due Process Clause, as well as the Ninth Amendment. *Id.* at 51.

ARGUMENT

The Court should certify the November Order for interlocutory review. A request for permissive interlocutory appeal is governed by 28 U.S.C. § 1292(b), which permits a district court to certify an interlocutory order for immediate appeal if the court is of the opinion that such order: (1) involves a controlling question of law; (2) as to which there is substantial ground for difference of opinion; and (3) that an immediate appeal from the order may materially advance the ultimate termination of the litigation. As explained below, in denying the motions to dismiss, the November Order also decided five "controlling questions of law," as to which there is a "substantial ground for difference of opinion." Resolution of these controlling questions by the Ninth Circuit Court of Appeals is likely to "materially advance the ultimate termination of the litigation" because, if resolved in the United States' favor, they would dispose of the claims before the Court.

I. The November Order decided several controlling questions of law.

A question of law is controlling for purposes of 28 U.S.C. § 1292(b) if resolution of the issue on appeal could materially affect the outcome of litigation in the district court. *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026-27 (9th Cir. 1982). And although resolution of an issue need not necessarily terminate an action in order to be "controlling," where the reversal of the district court's order would terminate the litigation, the question of law is controlling. *Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 24 (2d Cir. 1990); *see also* 16 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3930 (3d. ed. 2012) ("There is no doubt that a question is 'controlling' if its incorrect disposition would require reversal of a final judgment, either for further proceedings or for a dismissal that might have been ordered without the ensuing district-court proceedings." (footnote omitted)). Moreover, if the appellate court will be required to reverse if it determines that the legal question was wrongly decided, the question is controlling. *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir. 1974) (en banc).

The Court's rulings on whether Plaintiffs adequately alleged standing and whether the Due Process and public trust claims are cognizable or justiciable each present "controlling" questions of law, because contrary rulings by the court of appeals would likely terminate the case.

A. The determinations on the injury, causation, and redressability prongs of standing are controlling questions of law.

With respect to standing, the Court's determination that the Plaintiffs adequately pleaded an "injury in fact," that is, an invasion of a "legally protected" or "judicially cognizable" interest that is "concrete and particularized" as well as "actual or imminent," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 575-76 (1992) (*Lujan*), is indisputably a controlling issue of law. Similarly, the Court's determination that Plaintiffs adequately pleaded the causation element of standing based on generalized allegations that Federal Defendants have jurisdiction over various aspects of production, transportation, and consumption of fossil fuels and the alleged "aggregate effects" of CO_2 emissions from United States sources over many decades, is a controlling issue of law. The Court's determination that Plaintiffs adequately pleaded the redressability element of standing, even though the complaint did not identify particular wrongful government actions or inactions whose correction would likely result in lessening the asserted injuries, also presents a controlling issue of law. The Plaintiffs theories of injury, causation and redressability are deficient as a matter of law, and in all three instance, the question of the legal adequacy of Plaintiffs' allegations are indisputably "controlling" because a finding that Plaintiffs inadequately pleaded these elements of standing would require dismissal of their claims for lack of jurisdiction. *See, e.g.*, *Edwards v. First Am. Corp.*, 610 F.3d 514, 515-16 (9th Cir. 2010) (accepting jurisdiction where controlling issue is denial of motion to dismiss for lack of standing).

B. The finding of a new fundamental constitutional right to a climate system capable of sustaining human life is a controlling question of law.

The Court's rulings on the merits likewise present controlling questions of law. With respect to the Fifth Amendment Due Process claim, the Court found that there is a fundamental Due Process right "to a climate system capable of sustaining human life." The Court's interpretation of the Fifth Amendment is certainly a controlling question of law. As the Court noted, it is "clear . . . that defendants' affirmative actions would survive rational basis review." Op. at 30. Thus, Plaintiffs' Due Process claim would necessarily fail but for the Court's finding of a new fundamental right.

C. The finding of a new federal public trust cause of action is a controlling question of law.

With respect to the public trust claim, the Court found that because they allege injuries related to the effects of ocean acidification and rising ocean temperatures, Plaintiffs stated a cognizable public trust claim against the federal government that is not displaced by federal statute. *Id.* at 40-51. The Court's interpretations of the public trust doctrine, and each of its constituent parts, constitute controlling questions of law. A contrary interpretation—that the public trust doctrine does not apply to the federal government or that, even if it did, it is displaced by federal statutes—would require dismissal of the public trust claim.

II. There are substantial grounds for differences of opinion.

"A substantial ground for difference of opinion exists where reasonable jurists *might disagree* on an issue's resolution, not merely where they have already disagreed." *Reese v. BP Expl. (Alaska), Inc.*, 643 F.3d 681, 688 (9th Cir. 2011) (emphasis added). "Courts traditionally will find that a substantial ground for difference of opinion exists where . . . novel and difficult questions of first impression are presented." *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010) (quoting 3 FEDERAL PROCEDURE, LAWYERS ED. § 3:212 (2010)). If "novel legal issues are presented, on which fair-minded jurists might reach contradictory conclusions, a novel issue may be certified for interlocutory appeal without first awaiting development of contradictory precedent." *Reese*, 643 F.3d at 688 (footnote omitted).

Here, there are unquestionably substantial grounds for differences of opinion. The Court's rulings are novel, as with the ruling that Plaintiffs have adequately alleged injury to a legally protected or judicially cognizable interest and that there is a fundamental constitutional right to a climate system capable of sustaining human life; or concern issues on which fair-minded jurists might reach contradictory conclusions as with the rulings on the causation and redressability elements of standing and on the recognition of a generalized claim against the United States under the Due Process Clause and the public trust doctrine based on the general effects of climate change.

A. There are substantial grounds for differences of opinion with respect to the Court's determination that Plaintiffs have adequately alleged standing.

While the Court held in the November Order that Plaintiffs had adequately alleged Article III standing, reasonable jurists might readily disagree. At the heart of standing doctrine is "the Art. III notion that federal courts may exercise power only in the last resort, and as a necessity . . . and only when adjudication is consistent with a system of separated powers and the dispute is one traditionally thought to be capable of resolution through the judicial process." *Allen v. Wright*, 468 U.S. 737, 752 (1984) (internal citations, quotation marks and punctuation omitted), *abrogated in non-relevant part by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014); *see also Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013) (standing requirement preserves the separation of powers by "prevent[ing] the judicial process from being used to usurp the powers of the political branches."). The Court's determinations that the Plaintiffs carried their burden of alleging the injury-in-fact, causation, and redressability elements of standing all conflict with Supreme Court standing jurisprudence in ways that raise significant separation of powers concerns, warranting certification for interlocutory appeal.

1. *Lack of cognizable injury-in-fact*

To establish standing, Plaintiffs must first allege "an invasion of a *legally protected* interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (emphasis added, internal citations and punctuation omitted). The Court has consistently "stressed that the alleged injury must be legally and judicially cognizable." *Raines v. Byrd*, 521 U.S. 811, 819 (1997). As the Court in *Raines* explained, "[t]his requires, among other things, that the plaintiff have suffered 'an invasion of a legally protected interest which is . . . concrete and particularized,' *Lujan, supra*, at 560 . . . and that the dispute is 'traditionally thought to be capable of resolution through the judicial process,' *Flast v. Cohen*, 392 U.S. 83, 97 . . . (1968)."

The injuries alleged by Plaintiffs are widely shared by essentially every member of society. This is not a case like *Massachusetts v. EPA*, 549 U.S. 497 (2007), where a State was given "special solicitude" to pursue a claim involving an alleged failure to comply with a specific provision of the Clean Air Act because it had a "stake in protecting its quasi-sovereign interests" through the exercise of a "procedural right" provided in that statute. *Id.* at 518-20; *see Bellon*, 732 F.3d at 1145 (expressly finding that standing holding in *Massachusetts v. EPA* does not apply where "the present case neither implicates a procedural right nor involves a sovereign state"). There is no equivalent provision giving these Plaintiffs a protectable interest in seeking relief from effects allegedly resulting from the aggregate effect of individual and governmental actions and inactions over many decades relating to CO_2. And whereas Massachusetts' claim "turn[ed] on the proper construction of a congressional statute, a question eminently suitable to resolution in federal court," 549 U.S. at 516, Plaintiffs' claims ask the Court to make essentially legislative determinations, derived directly from the Due Process Clause itself or vague notions of a public trust, regarding energy, transportation, public lands and pollution control policies, matters which do not present a dispute that is "traditionally thought to be capable of resolution through the judicial process." *Raines, supra,* 521 U.S. at 819. While Congress may "elevat[e] to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law," *Lujan,* 504 U.S. at 578, it plainly has not done so with regard to injuries allegedly stemming from failure to protect a "a climate system capable of sustaining human life." Op. 32. Accordingly, there are substantial grounds for differences of opinion with respect to the Court's determination of injury-in-fact.

2. *Lack of causation*

With respect to the causation prong, there are substantial grounds for differences of opinion as to whether Plaintiffs have plead a fairly traceable causal chain from particular acts of the Federal Defendants to particularized injuries suffered by Plaintiffs. The requirement that a plaintiff identify with particularity a government failure that can be shown to be a meaningful cause of the plaintiff's injury is a central part of the Article III inquiry that cannot be avoided by the simple expedient of aggregating a vaguely-defined category of government actions and inactions as Plaintiffs do here. In *Lewis v. Casey*, the Supreme Court emphasized that "standing is not dispensed in gross. If the right to complain of *one* administrative deficiency automatically conferred the right to complain of *all* administrative deficiencies, any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review." 518 U.S. 343, 358 n.6 (1996); *see also Allen*, 468 U.S. at 752 ("the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted"), *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006) ("[t]he actual-injury requirement would hardly serve the purpose . . . of preventing courts from undertaking tasks assigned to the political branches[,] if once a plaintiff demonstrated harm from one particular inadequacy in government administration, the court were authorized to remedy *all* inadequacies in that administration") (quoting *Lewis*, 518 U.S. at 357). Reasonable jurists have a substantial basis from which to conclude that Plaintiffs failed to satisfy this requirement.

In the November Order, the Court distinguished *Bellon*, primarily on the grounds that it was decided on summary judgment rather than at the motion to dismiss stage: "Plaintiffs have alleged a causal relationship between their injuries and defendants' conduct. At this stage, I am bound to accept those allegations as true." Op. at 23. But again, reasonable jurists might disagree. While *Bellon* was a summary judgment case, the court there did not suggest that a court must accept as true vague allegations of a causal connection that do not attempt to connect plaintiffs' alleged injuries with particular agency actions or inactions. To the extent *Bellon* suggests that the complaint in that case was adequate to survive a motion to dismiss, it was because the complaint alleged particular agency inaction with respect to identified refineries sufficient to permit the court to determine whether the injuries were fairly traceable to the agencies' alleged misconduct, rather than the conduct of third parties. Similarly, in *Massachusetts v. EPA*, the State specifically alleged that its injuries were caused by a particular failure of the Defendant agency – EPA's denial of a rulemaking petition asking it to regulate greenhouse gas emissions from new motor vehicles under a specific section of the Clean Air Act – and that this specific action caused significant greenhouse gas emissions. 549 U.S. at 510-14, 523-24.

Here, the complaint simply lists statutes, regulations, orders, and other agency actions and inactions and then alleges that the entire course of federal government conduct in the past decades has caused Plaintiffs' injuries. There is no way to determine from the complaint what role particular actions of each Defendant agency has played or will play in the creation of the alleged injuries, as opposed to the role played by third parties not before the court. And while the complaint alleges that the Federal Defendants have failed to take steps Plaintiffs believe are necessary to avert injury,[1] they never allege that the Federal Defendants are authorized (let alone

[1] *See, e.g.*, First Am. Compl at ¶99 (alleging that the "President has failed to utilize his Office to initiate any comprehensive effort to phase out fossil fuel emissions by amounts that could avert dangerous disruption of the climate system"); ¶ 106 (alleging that Department of Energy "has knowingly failed to perform its duty to transition our nation away from the use of fossil fuel energy"); ¶ 180 ("President Obama has failed to dismantle the U.S. fossil fuel edifice").

required) by statute to take these steps, or for that matter recognize that the Federal Defendants' actions are limited by statutes.

The Supreme Court has stressed that "when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Lujan*, 504 U.S. at 562 (quoting *Allen*, 468 U.S. at 758). Thus, where "causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well . . . it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury." *Id.* These limitations are rendered meaningless if a plaintiff can lump together everything the federal government does or does not do that relates to the emission of CO_2 and simply allege that the "aggregate" effect of government conduct and private conduct that they allege that the government should regulate or prohibit is to cause injury through climate change. And thus, reasonable jurists can surely disagree with the Court's conclusion that Plaintiffs have adequately alleged causation.

The Supreme Court's opinion in *Allen* explains why the requirement for a plaintiff to trace his or her injury to *particular* actions of defendants is an essential component of the Article III limitations on the authority of federal courts. The Court observed that allowing standing where the injury could not fairly be traced to the particular government action "would pave the way generally for suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations," and that "[s]uch suits, even when premised on allegations of several instances of violations of law, are rarely if ever appropriate for federal-court adjudication." 468 U.S. at 759-60. That observation applies with even greater force here, where Plaintiffs attempt to challenge the entire course of federal government decision-making relating to activities that are associated with the emission of CO_2.

The Court in *Allen* also cautioned that "'[c]arried to its logical end, [respondents'] approach would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action." *Id.* at 760 (quoting *Laird v. Tatum*, 408 U.S. 1, 15 (1972)). That is the very result Plaintiffs seek here, in the form of an order directing the Federal Government to reduce CO_2 emissions while indefinitely retaining jurisdiction to police the Government's compliance with that order. But as the Court explained, "such a role is appropriate for the Congress acting through its committees and the 'power of the purse'; it is not the role of the judiciary, absent actual present or immediately threatened injury resulting from unlawful governmental action.'" *Id.* (quoting *Laird*, 408 at 15).

Massachusetts v. EPA provides no support for a finding of causation. First, as noted, the Ninth Circuit has held that the standing holding in that case does not apply outside the specific context of a claim brought by a sovereign State pursuant to a specific statutory cause of action. *See Bellon*, 732 F.3d at 1145. If anything, *Massachusetts* is even less relevant here than it was in *Bellon*, since the *Bellon* plaintiffs at least identified a discrete agency failure to act under the Clean Air Act which they alleged caused their injuries. 732 F.3d at 1137-38. With the lone exception of the Jordan Cove LNG facility, the Plaintiffs have not attempted to identify particular agency actions or discrete failures to act, and there is no analog to the statutory cause of action that was critical in *Massachusetts*. Indeed, Plaintiffs do not even invoke the Court's jurisdiction under the Administrative Procedure Act ("APA") to bring this suit, since they do not challenge discrete final agency action or point to a discrete agency action that they contend an agency was compelled to take. *See* 5 U.S.C. § 706. For all of these reasons, the Court's determination that Plaintiffs adequately alleged causation warrants interlocutory appeal.

3. *Lack of redressability*

Similarly, there are substantial grounds for differences of opinion with respect to the Court's determination of redressability because, as with its finding on causation, the Court assumed that Plaintiffs can "aggregate" all sources of CO_2 emissions that have any connection with the federal government or federal lands, and allege that reducing that aggregate quantity by some sort of relief directed at the federal government would lessen their injuries. *See* Op. at 27 ("If plaintiffs can show, as they have alleged, that defendants have control over a quarter of the planet's greenhouse gas emissions, and that a reduction in those emissions would reduce atmospheric CO_2 and slow climate change, then plaintiffs' requested relief would redress their injuries"). A reasonable jurist could conclude that this approach is at odds with *Allen* and *Lujan*, as well as to *Lewis v. Casey*, 518 U.S. at 358 n.6, which affirms that the doctrine of standing allows redress of *particular* administrative deficiencies, rather than "confer[ing] the right to complain of *all* administrative deficiencies," since otherwise "any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review."

Still further, reasonable jurists could conclude that Plaintiffs' redressability theory fails to recognize that the agency Defendants are creatures of statute and have only the legal authority that their organic statutes provide. As the Court observed, the complaint asked it to:

> "order Defendants to cease their permitting, authorizing, and subsidizing of fossil fuels and, instead, move to swiftly phase out CO_2 emissions, as well as take such other action necessary to ensure that atmospheric CO_2 is no more concentrated than 350 ppm by 2100, including to develop a national plan to restore Earth's energy balance, and implement that national plan so as to stabilize the climate system."

Op. at 28 (quoting Compl. ¶ 12). But the complaint never alleges that the agencies have statutory authorization for the remedial actions sought. Nor, under our Constitution's framework of separation of powers, could the Court compel Congress to enact additional authority that would be needed to provide the requested relief.

As with the injury-in-fact and causation prongs, *Massachusetts v. EPA* also offers no support for Plaintiffs' claim of redressability. Massachusetts in its sovereign capacity sought to enforce an alleged statutory duty to control greenhouse gas emissions from domestic automobiles by bringing a statutory cause of action. *See* 549 U.S. at 524-26. Unlike the present case, the Supreme Court specifically noted that "[t]he parties' dispute turns on the proper construction of a congressional statute, a question eminently suitable to resolution in federal court." *Id.* at 516. Here, the complaint ignores the various statutes that limit the relief that can be granted by a federal court.

The Court presumed that Plaintiffs could bring a due process claim without reference to any statutory waiver of sovereign immunity or cause of action, apparently inferring a private cause of action in the Constitution itself. But the cases cited in support of the due process ruling, unlike this case, arose in the context of statutory challenges to discrete agency actions. *See, e. g.*, *Witt v. Dep't of the Air Force*, 527 F.3d 806, 813 (9th Cir. 2008) (challenge to military discharge); *Kim v. United States*, 121 F.3d 1269, 1273 (9th Cir. 1997) (challenge to disqualification from a federal food stamp program). Here, Plaintiffs bring a programmatic challenge not countenanced by any provision of law. And even if the Administrative Procedure Act were understood to provide the requisite waiver of sovereign immunity here, *see The Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 523-24 (9th Cir. 1989) (finding APA waived sovereign immunity for constitutional claims), Plaintiffs can demonstrate no basis for the equitable relief they seek. To the contrary, it is clear that this sprawling action cannot be brought under some notion of a court's inherent equitable powers. To do so would exceed any reasonable bounds of Article III and for that reason would have to be dismissed on equitable discretion grounds.

Finally, no relief could be obtained against the President. *See, e.g., Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1867) ("this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties"). "There is longstanding legal authority that the judiciary lacks the power to issue an injunction or a declaratory judgment against the co-equal branches of government . . ." *Newdow v. Bush*, 355 F. Supp. 2d 265, 280-82 (D.D.C. 2005) (declining to carve an exception to Presidential immunity "where [the President] is claimed to have violated the Constitution"); *see also Clinton v. Jones*, 520 U.S. 681, 718-19 (1997) (Breyer, J. concurring) (acknowledging "the apparently unbroken historical tradition . . . implicit in the separation of powers that a President may not be ordered by the Judiciary to perform particular Executive acts") (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 802–03 (1992) (Scalia, J. concurring)); *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923) ("The general rule is that neither department may invade the province of the other and neither may control, direct, or restrain the action of the other.").

In sum, Plaintiffs' redressability allegations failed to establish an Article III controversy, where Plaintiffs failed to identify specific agency actions or inactions that could be addressed by a federal court and failed to identify any statutory authority for an order directing the Federal Defendants collectively to broadly roll back the aggregate amount of CO_2 that they would associate generally with the federal government and federal lands.

B. Reasonable jurists have a substantial basis to disagree with the Court's conclusion that the Due Process Clause protects a fundamental right to a climate system capable of sustaining human life.

The Court's finding of a fundamental Due Process right to a "climate system capable of sustaining human life" is entirely novel. Until the November Order, no federal court at any level had ever found such a right, and many courts have dismissed similar arguments asserting constitutionally-protected rights to various aspects of the environment. *See Nat'l Sea Clammers Ass'n v. City of New York*, 616 F.2d 1222, 1237-38 (3d. Cir. 1980) ("[i]t is established in this circuit and elsewhere that there is no constitutional right to a pollution-free environment"), dismissed and vacated in part on other grounds sub nom. *dismissed and vacated in part on other grounds sub nom. by Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981); *S.F. Chapter of A. Philip Randolph Inst. v. EPA*, No. C 07-04936 CRB, 2008 WL 859985, at *6-7 (N.D. Cal. Mar. 28, 2008) ("Plaintiffs also allege deprivation of the right to be free of climate change pollution, but that right is not protected by the Fourteenth Amendment [Due Process Clause] either."); *Pinkney v. Ohio Envtl. Prot. Agency*, 375 F. Supp. 305, 310 (N.D. Ohio 1974) ("[T]he Court has not found a guarantee of the fundamental right to a healthful environment implicitly or explicitly in the Constitution."); *Gasper v. La. Stadium & Exposition Dist.*, 418 F. Supp. 716, 720-21 (E.D. La. 1976), *aff'd*, 577 F.2d 897 (5th Cir. 1978) ("[T]he courts have never seriously considered the right to a clean environment to be constitutionally protected under the Fifth and Fourteenth Amendments."); *Hagedorn v. Union Carbide Corp.*, 363 F. Supp. 1061, 1064-65 (N.D. W. Va. 1973) (finding no cause of action under the Fifth, Ninth, or Fourteenth Amendments for a complaint alleging that emissions were fouling the air); *Tanner v. Armco Steel Corp.*, 340 F. Supp. 532, 537 (S.D. Tex. 1972) ("[N]o legally enforceable right to a healthful environment, giving rise to an action for damages, is guaranteed by the Fourteenth Amendment or any other provision of the Federal Constitution.").

The consistent and long-standing refusal of other courts to accept a Due Process right to environmental quality is consistent with the Supreme Court's cautious approach in considering novel Due Process claims and "insistence that the asserted liberty interest be rooted in history and tradition." *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989). In *Washington v. Glucksberg*, the Court emphasized that federal courts must "exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into" judicial policy preferences, and important issues be placed "outside the arena of public debate and legislative action." 521 U.S. 702, 720 (1997).; *see also Reno v. Flores*, 507 U.S. 292, 302 (1993) ("Substantive due process" analysis must begin with a careful description of the asserted right, for "[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.") quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992). Finding a fundamental right to a climate system of a certain kind or quality would divest the arena of public debate and legislative action as the primary forum for devising environmental policy and make the courts the arbiters of what steps the government is required to take to avoid violations of this alleged right.

The Supreme Court has recently emphasized how, under established separation-of-powers principles, Congress, through legislation, defines the EPA's authorities and duties regarding the control of greenhouse gas emissions, while the Executive executes them: "[u]nder our system of government, Congress makes laws and the President, acting at times through agencies like EPA, 'faithfully execute[s]' them." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014) (quoting U.S. Const., Art. II, § 3); *see also AEP*, 564 U.S. at 423-24 (once Congress legislates to deal with a problem like greenhouse gas emissions, causes of action aimed at the problem under common law tort or nuisance theories are displaced). There is no room in the constitutional structure for a federal court to take on the role of overseeing the propriety of all governmental actions that may be viewed as contributing to the buildup of CO_2 in the atmosphere.

The November Order relies in part on *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015)—where the Supreme Court identified a "new" fundamental right to same-sex marriage. Op. at 30-31. However, *Obergefell* does not grant a general license for courts to recognize new fundamental rights. To the contrary, *Obergefell* arose from prior decisions establishing that "[t]he fundamental liberties protected by [the Due Process] Clause include . . . certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs." 135 S. Ct. at 2597. Among those earlier cases were ones upholding the right to marry by interracial couples, incarcerated persons, and others. *See id.* at 2598 (citing, *inter alia*, *Turner v. Safley*, 482 U.S. 78, 95 (1987); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978); *Loving v. Virginia*, 388 U.S. 1, 12 (1967)). While *Obergefell* extended that existing line of cases to recognize a fundamental right to marry for same-sex couples, the "fundamental right" established by the November Order has no relation to any subject that has previously been afforded heightened constitutional protection by the Supreme Court. It also is not individualized and touching upon intensely personal choices and liberty interests in the way the fundamental rights the Supreme Court has recognized are. Rather, it is an interest that could be advanced by any person in the Nation, or indeed on the planet. Reasonable jurists may therefore disagree that the Due Process Clause protects such an asserted right.

There are also substantial grounds for a difference of opinion about the November Order's conclusion that Plaintiffs have a cognizable claim based on allegations that Federal Defendants knowingly created "dangers" to Plaintiffs' asserted fundamental right and failed to undertake the measures necessary to abate those dangers. The Court acknowledged that "[w]ith limited exceptions, the Due Process Clause does not impose on the government an affirmative obligation to act, even when 'such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.'" Op. at 33 (quoting *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989)). But the Court invoked an exception to the *Deshaney* "no-affirmative-obligation" rule, which has been reserved in the Ninth Circuit for situations where state agents intentionally place a person in a dangerous situation short of actual custody. *See Pauluk v. Savage*, 836 F.3d 1117, 1125 (9th Cir. 2016). It found that the United States would be liable under the Due Process Clause if Plaintiffs can show that the government's actions created danger to Plaintiffs, the government knew that its acts caused danger, and with deliberate indifference it failed to act to prevent the harm.

Whether the exception applies here, at the very least, presents substantial grounds for a difference of opinion among reasonable jurists. Under the relevant Ninth Circuit cases, a plaintiff invoking the exception must show that the state affirmatively subjected him to "an actual, particularized danger," which necessarily would exclude the generalized risks created by not taking more aggressive action to reduce emissions of CO_2 to the atmosphere. *Id.* (quoting *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1063 (9th Cir. 2006)). In each of the Ninth Circuit cases, a plaintiff sued a state actor who facilitated a substantial invasion of a plaintiff's rights. *Wood v. Ostrander*, 879 F.2d 583, 586 (9th Cir. 1989) (bodily harm); *L.W. v. Grubbs*, 974 F.2d 119, 120 (9th Cir. 1992) (bodily harm); *Munger v. City of Glasgow Police Dep't*, 227 F.3d 1082, 1084-85 (9th Cir. 2000) (life). None of these cases suggest that there is a protectable Due Process right in the atmosphere, or that the Due Process Clause provides a cause of action to challenge whether the federal government abridged such a right in the generalized context of this case.

C. Reasonable jurists already have disagreed with the Court's conclusion that a plaintiff may state a "public trust" claim against the Federal Government over climate change.

There are substantial grounds for difference of opinion as to the viability of Plaintiffs' "public trust" claim because reasonable jurists already have reached a contrary conclusion to the Court's November Order. Indeed, in *Alec L. v. Jackson*, 863 F. Supp. 2d 11 (D.D.C. 2012), *aff'd*, *Alec L. ex rel. Loorz v. McCarthy*, 561 F. App'x 7 (D.C. Cir. 2014), plaintiffs (including some of the plaintiffs here) alleged that EPA and the Departments of Agriculture, Commerce, Defense, Energy, and the Interior had violated fiduciary duties to preserve and protect the atmosphere as a commonly-shared public resource under an asserted public trust doctrine. They invoked the federal question statute, 28 U.S.C. § 1331, as the basis for subject matter jurisdiction over this "public trust" claim. The court in *Alec L.* found no support for the assertion that a public trust doctrine or claims based on such a doctrine arise under the Constitution or laws of the United States. *Id.* at 15. The court cited the Supreme Court's decision in *PPL Montana*, 565 U.S. at 603-04, for the proposition that "the public trust doctrine remains a matter of state law," and that "the contours of that public trust do not depend upon the Constitution." (quoting *PPL Montana*, 565 U.S. at 603-04).

The district court in *Alec L.* also found that even if a public trust doctrine had provided a claim under federal law at one time, that claim has been displaced by federal laws, specifically the Clean Air Act. For this alternative ruling, the *Alec L.* court relied on *AEP*, in which the Supreme Court held that "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants." 564 U.S. at 423-24.

The D.C. Circuit affirmed dismissal of the *Alec L.* case in an unpublished memorandum decision, finding that the district court had correctly dismissed the suit for lack of subject matter jurisdiction because public trust doctrine is a matter of state, rather than federal law. *Alec L. ex rel. Loorz v. McCarthy*, 561 F. App'x 7, 8 (D.C. Cir. 2014). Likewise, the Ninth Circuit has also interpreted *PPL Montana* as establishing that public trust doctrine is a matter of state law, and as such does not restrict the power of the United States to condemn a parcel of former tidelands in fee. *United States v. 32.42 Acres of Land*, 683 F.3d 1030, 1038-39 (9th Cir. 2012).

The November Order recognizes that "*Alec L.* was substantially similar to the instant action." Op. at 45. Nevertheless, the Court indicated that it was "not persuaded by the reasoning of the *Alec L.* courts," because, in its view "a close reading of *PPL Montana* reveals that it says nothing about the viability of federal public trust claims." *Id.* at 46. The Court's recognition that *Alec L.* reached a contrary decision only proves that there is substantial ground for difference of opinion on the issue warranting interlocutory appeal.[2]

There are also substantial grounds for disagreement with the November Order's treatment of *United States v. 32.42 Acres*, where the Ninth Circuit held that the public trust doctrine is a matter of state law because state law determines the rights and privileges in submerged lands that may be granted by a State to a private individual. 683 F.3d at 1038. The Court distinguished *32.42 Acres* on the ground that the Ninth Circuit did not reach the public trust issue with regard to 4.88 acres as to which the United States did not appeal a district court judgment and had accepted a federal public trust theory. Op. at 47. But the Ninth Circuit had no occasion to revisit the status of the 4.88 acre parcel or the district court decision, which preceded *PPL Montana*. More relevant here is the Ninth Circuit's determination that the public trust doctrine is a matter of state law that is subject to the Supremacy Clause, and thus could not limit the federal government's title to the rest of the property. *32.42 Acres*, 683 F.3d at 1038. At any rate, reasonable jurists could very well disagree with the Court's conclusion that *32.42 Acres* is inapposite.

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[2] The Supreme Court has always addressed the public trust doctrine in connection with state management of coastal regions and navigable waterways. *See, e.g.*, *PPL Montana*, 565 U.S. at 604 (the public trust doctrine applies to the residual power of the states "over waters within their borders"); *Philipps Petroleum Co. v. Mississippi*, 484 U.S. 469, 479 (1988) (applying the "public trust doctrine to navigable freshwaters and the lands beneath them" and explaining that "the American public trust doctrine make it clear that navigability . . . has become the *sine qua non* of the public trust interest"). In the November Order, the Court found that, "[b]ecause a number of plaintiffs' injuries relate to the effects of ocean acidification and rising ocean temperatures, they have adequately alleged harm to public trust assets." Op. at 42 (footnote omitted). But there is no support in public trust propositions for bringing a claim based on allegations that depend on such an indirect line of causation; *i.e.*, that CO_2 emissions from challenged actions and non-actions, when combined with all other worldwide emissions of CO_2 over decades, leads to warmer and more acidic oceans, which affects particular coastal areas that may be subject to the public trust doctrine.

Reasonable jurists could also agree with Federal Defendants on a strong alternative ground for rejecting the public trust claim. Namely, any such claim brought with respect to the emission of CO_2 has been displaced by the Clean Air Act and EPA's regulations under that Act. That result follows from the Supreme Court's *AEP* decision, which rejected claims against emitters of CO_2 that were based on common law public nuisance theories. Consistent with *AEP*, the Ninth Circuit found that it was bound to dismiss an action by an Alaskan village under a federal common-law claim of public nuisance against multiple oil, energy, and utility companies. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012). The village had alleged that the companies' greenhouse gas emissions had resulted in global warming, which in turn severely eroded land upon which the village was situated. The Ninth Circuit ruled that it was bound by the holding in *AEP* to find that any federal common law cause of action had been displaced by the Clean Air Act. *Id.* at 856-58. Similarly, the district court in *Alec L.* recognized that any public trust claim arising under federal common law—even assuming such a claim were otherwise cognizable—would be displaced by the Clean Air Act. 863 F. Supp. 2d at 15-16.

In the November Order, the Court indicated that it was "not persuaded by the *Alec L.* court's reasoning regarding displacement." Op. at 49. In the Court's view "[p]ublic trust claims are unique because they concern inherent attributes of sovereignty" and thus "displacement analysis simply does not apply." *Id.* But again, this disagreement only highlights that there is substantial ground for difference of opinion. The Court's decision on the public trust claim and the *Alec L.* court's contrary decision on the same claim together demonstrate that fair-minded jurists have reached contradictory conclusions on this novel issue and thus there is a substantial ground for a difference of opinion as to it.

III. Immediate appeal would promote the ultimate determination of the litigation.

The question of whether an immediate appeal may materially advance the ultimate termination of the litigation is related to the question of whether the order at issue involves a controlling question of law. *See* 16 FEDERAL PRACTICE & PROCEDURE § 3930. Because the issues in this case are clearly controlling, an "immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

Here, an interlocutory appeal could avoid litigation that is unprecedented in its scope and in its potential to be protracted, expensive, and disruptive to the continuing operation of the United States Government. The complaint is staggeringly broad and it seeks relief that is equally broad. The complaint indicates that Plaintiffs believe they can inquire into virtually every aspect of the federal government's management of oil, gas, and coal production, transportation or consumption, the regulation of emissions from all sources of CO_2, including motor vehicles, and more. And the relief that Plaintiffs seek in this case would significantly disrupt the majority of activities undertaken by large operational units within the named agencies. Put simply, Plaintiffs' proposed inquiry into seven decades of information related to climate change could cripple units within agencies that gather potentially relevant data or analyze climate change more broadly.

Notwithstanding whatever efforts the parties may undertake to limit discovery, this case will likely be extraordinarily intrusive involve an extraordinarily-drawn out discovery process. This is borne out by Plaintiffs' indications as to how they intend to conduct the litigation. Already, Plaintiffs have demanded that the Office of the President, CEQ, OMB, and the Executive Branch Departments preserve any and all documents and records related to the claims in the complaint, including, *inter alia* all documents and records "related to climate change since the Federal Defendants or the Intervenor Defendants (and their member companies) became aware of the possible existence of climate change." Pls.' Jan. 24, 2017 Litigation Hold Demand Letter at 5 (attached as Ex. A).

As explained above, a suit directly against the President for injunctive relief is improper and must be dismissed, and all discovery propounded to the Office of the President and other components of the Executive Office of the President is without foundation for that reason alone. And while discovery is supposed to await adoption of a discovery plan, Plaintiffs on December 28, 2016, noticed the deposition of then-nominee Rex Tillerson—who is now the Secretary of State—and requested records relating to his communications with a number of persons and entities going back at least to 1992. And on the day of the President's inauguration and again before any discovery plan was in place, Plaintiffs propounded Requests for Admissions—from the Executive Office of the President and the EPA—seeking admissions on issues central to their case. Absent relief, there would most certainly be depositions of federal government fact witnesses and 30(b)(6) designees that would seek to explore the extraordinarily broad topic of climate change and the federal government's knowledge of climate change over the past seven decades. This endeavor is virtually limitless in its scope and unprecedented.

If Plaintiffs had brought a claim under the APA that challenged particular agency action or asserted a failure to take agency action that is compelled by law, judicial review would necessarily be based on the administrative record, not some new record compiled in Court. *Camp v. Pitts*, 411 U.S. 138, 142 (1973). That central tenet of the judicial role in reviewing actions of Executive agencies cannot be circumvented by seeking to bring a broad, wholly extra-statutory equitable action in court.

Even if fact discovery were not exceptionally broad, the expert phase of discovery will most certainly be. Plaintiffs have indicated that they will seek to introduce the evidence of fifteen to twenty experts across numerous scientific and other disciplines. Feb. 7, 2017 Tr. 26:18-19. The proposed number of experts here is unsurprising: the issues raised by this lawsuit are the subject of intense scientific debate and span numerous areas of research. Expert discovery would likewise be protracted, complicated and involve a large number of experts synthesizing complex data. In short, given the breadth the claims, their temporal scope, and scientific complexity, the discovery is likely to be time-consuming and resource-intensive.

Were the United States to prevail in an appeal, it could avoid protracted litigation that would constitute a grave intrusion upon the separation of powers and is likely to be disruptive to the conduct of many vital government functions.

The extraordinary claims that the Court has allowed to go forward challenge a huge swath of government decision-making over many decades. There is no apparent limiting principle to the district court's assumption of power to review federal actions or inactions that are linked to the emission of CO_2. For all of the foregoing reasons, the Court should grant the United States' request that it certify the November Order for interlocutory appeal.

CONCLUSION

For all of the foregoing reasons, the United States respectfully requests that the Court certify the five questions listed in the accompanying motion to certify the order for interlocutory appeal.

Dated: March 7, 2017

Respectfully submitted,

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Certificate of Service

I hereby certify that on March 7, 2017 I filed the foregoing with the Clerk of Court via the CM/ECF system, which will provide service to all attorneys of record.

/s/ Sean C. Duffy
Sean C. Duffy

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